

December 13, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Environmental Defense Institute

Date of Filing: September 18, 2006

Case Number: TFA-0177

On September 18, 2006, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) agreed to consider as an appeal, and to process as an appeal, an unsigned electronic mail message attachment submitted by the Environmental Defense Institute (the Appellant). The Appellant also attached to that electronic mail message a copy of a determination that DOE's Idaho Operations Office (Idaho) issued on December 5, 2005. In the Determination Letter, Idaho released to the Appellant several documents in full that were responsive to its request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. Idaho also redacted portions of two other documents, pursuant to Exemption 5 of the FOIA. This Appeal, if granted, would require Idaho to release the information it withheld from those documents and to release additional documents that the Appellant claims that Idaho has not released in response to the Appellant's FOIA requests dated July 7, 2005, and September 21, 2005.

I. BACKGROUND

In letters dated July 7, 2005, and September 21, 2005, the Appellant submitted FOIA requests to Idaho for documents relating to the Advanced Test Reactor (ATR) and other facilities at the Reactor Technologies Complex (RTC). Request Letters dated July 7, 2005, and September 21, 2005, from Chuck Broschius, Executive Director, Appellant, to FOIA Office, Idaho. In response to the Appellant's July 7, 2005 request, Idaho issued determinations on August 26, 2005, and September 14, 2005, in which it released numerous documents in full to the Appellant. In its September 14, 2005 Determination, it also stated that it was withholding portions of one document under Exemption 2 of the FOIA. On October 24, 2005, the Appellant filed with OHA an Appeal from Idaho's September 14, 2005 Determination. In a Decision and Order dated March 16, 2006, OHA concluded that Idaho had properly withheld the redacted material and denied the appeal with the exception of two pages. OHA remanded to Idaho for issuance of a new determination either releasing the information or justifying its withholding. *Environmental Defense Institute*, Case No. TFA-0128, (March 16, 2006).

After the Appellant filed its Appeal on October 24, 2005, Idaho responded to the Appellant's September 21, 2005 request by releasing additional documents in full to the Appellant, and releasing portions of other documents. In one of its responses, on December 5, 2005, Idaho released several documents to the Appellant. Two of those documents were released after redacting portions pursuant to Exemption 5 of the FOIA.

On December 17, 2005, the Appellant sent an electronic mail message to Janet R. H. Fishman, Staff Attorney, OHA, titled "FOIA Case TFA-0128". Electronic Mail Message dated December 17, 2005, from Chuck Broschious to Janet R. H. Fishman, OHA. The December 17, 2005 electronic mail message had two attachments. One was a copy of Idaho's December 5, 2005 determination. The second attachment was an unsigned letter dated December 16, 2005, and addressed to Mrs. Fishman. The heading on the first page of the letter stated "Sent via U.S. Certified Mail and email." OHA has no record of ever having received the letter by U.S. mail. DOE's FOIA regulations require that a FOIA appeal to OHA must be addressed to the Director of OHA and that the envelope and letter must be clearly marked "Freedom of Information Appeal." 10 C.F.R. § 1004.8(b). This electronic mail message failed to comply with those requirements. First, it was not addressed to the OHA Director. Secondly, it was not clearly marked as a FOIA Appeal. In a court pleading filed on August 8, 2006, the Appellant characterized that unsigned electronic mail message attachment as a supplement to its Appeal. In view of the Appellant's characterization of its unsigned electronic mail message attachment as a supplement to its Appeal, OHA, in a spirit of cooperation, agreed on September 18, 2006, to consider the attachment as a FOIA Appeal and to process it despite its failure to conform to the requirements of DOE's FOIA regulations. Herein we will denote that letter as the Appeal Letter from Chuck Broschious to Janet R. H. Fishman.

In that Appeal, the Appellant states that the

issue of DOE/ID redaction of requested FOIA documents now includes (due to additional document releases) . . . the following reports:

1. Upgraded Final Safety Analysis Report for the Advanced Test Reactor (SAR-153)
 - a. Chapter 1 (one page redacted)
 - b. Chapter 2 (two pages redacted)
 - c. Chapter 3 (25 pages redacted)
 - d. Chapter 3 Appendix A (all pages have portions redacted)
 - e. Chapter 4 (16 pages redacted)
 - f. Chapter 15 (completely redacted)
 - g. Chapter 16 (completely redacted)

2. Engineering Design File EDF-5622 (Interim Seismic Probabilistic Risk Assessment for the Advance Test Reactor[]]) has 9 pages redacted.
3. Interoffice Memorandum, FOIA Item #49 Appendix A, has 9 pages redacted.
4. On December 14, 2005, we received from DOE/ID, additional documents responsive to our requests. However, several more documents had been substantially redacted, and we therefore hereby appeal to your office and ask that the redacted documents, identified herein, also be released in full.
5. U.S. Government Memorandum, Idaho Operations Office, March 19, 2004, Advanced Test Reactor Continued [O]perations Planning Assessment Report (TPO-TRA-04-026) FOIA Item No. 41, has every page partially redacted and Office of Independent Oversight and Performance Assurance report is missing.
6. ATR Planning Assessment Team Report 2/13/04, FOIA Item Number 43, has portions or total pages redacted.
7. There remain about nine documents that are either being “processed” by DOE/ID and/or are being “transferred [to] HQ for response directly to requestor” (see list below). The final release disposition of these documents must be finalized in a timely [manner].
 - a. Item #37: OA-2003-ESH-6
 - b. Item #38: OA-2003-ESH-7
 - c. Item #39: OA-2003-ESH-8
 - d. Item #40: OA-2003-ESH-9
 - e. Item 43; Rice Report
 - f. Item # 58; Survey Seismic Evaluation of the Emergency Surveys for Nuclear Safety Culture classes at TRA (TRC) and associated final reports.
 - g. Item #59; 1993 (or later) Seismic Probabilistic Risk Assessment for EBR-II Reactor Building (767) at MFC formerly ANL-W.
 - h. Item #60; 1993 (or later) Seismic Probabilistic Risk Assessment for Fuel Manufacturing Facility Building 704 at MFC formally ANL-W.

- i. Item #44; All Un-reviewed Safety Question (USQ) ATR, RTC and MFC reports for 2004 and 2005 not listed in "DOE Summary Report Lists sent August 25, 2005."

Appeal Letter dated December 16, 2005, from Chuck Broschious to Janet R. H. Fishman, OHA. We will deal with each item separately.

II. ANALYSIS

Item 1–Upgraded Final Safety Analysis Report for the ATR

This document was dealt with in our decision dated March 16, 2006, where we upheld the redactions made by Idaho with one exception and returned the matter to Idaho for a determination on that matter. We ordered Idaho to review chapter 3/4, pages 0-1 and 0-2 of the ATR SAR to determine if any of the information could be reasonably segregated and released to the Appellant. Idaho released these pages without deletions to the Appellant by letter dated November 20, 2006, in order to be certain that the Appellant received them. Determination Letter dated November 20, 2006, from Nicole Brooks, Idaho, to Appellant.

Item 2–Engineering Design File EDF-5622

The Appellant claims that this document was released with nine pages redacted. The determination letter dated December 5, 2005, indicates that the document was released in full to the Appellant. We contacted Idaho to confirm that the document was released in full. Idaho confirmed that it re-released the document in its entirety to the Appellant on September 7, 2006. Electronic Mail Message dated November 2, 2006, from Nicole Brooks, Idaho, to Janet R. H. Fishman, Attorney-Examiner, OHA. We have been provided with a copy of the letter releasing the document to the Appellant. Attachment to electronic Mail Message dated November 2, 2006, from Nicole Brooks, Idaho, to Janet R. H. Fishman, OHA.

Item 3–Interoffice Memorandum

The Appellant claims that this document was also released with nine pages redacted. As was done with Item 2, Idaho has re-released the document to the Appellant in full. Idaho confirmed that it re-released the document to the Appellant on November 14, 2006. Letter dated November 14, 2006, from Nicole Brooks to Appellant.

Item 4–Additional documents

December 14, 2005, was the date on which the Appellant received Idaho's December 5, 2005 determination. The Appellant asks that the documents it received on that date be released

in full. However, all the documents that were not released in full by Idaho are specifically addressed in the Appeal Letter. Therefore, Item 4 appears to be an introduction to Items which follow in the Appellant's letter. We have addressed two of the documents listed as Items 2 and 3. We will address the remainder of the Items below.

Item 5–Memorandum
Item 6–ATR Planning Assessment Team Report
Item 7f–Survey Seismic Evaluation of the Emergency Surveys for Nuclear Safety
Culture classes at TRA (TRC) and any associated final reports

Idaho withheld portions of these three documents under FOIA Exemption 5. The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). “An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption.” *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency has a substantial burden to justify the withholding. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*).

Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to “exempt those documents, and only those documents, normally privileged in a civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*).

Included within the boundaries of Exemption 5 is the “predecisional” privilege, sometimes referred to as the “executive” or “deliberative process” privilege. *Coastal States*, 617 F.2d at 862. The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. The privilege is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958)).

The deliberative process privilege also permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the

process by which government formulates decisions and policies. *Sears*, 421 U.S. at 150. The purpose of the privilege is to protect the quality of agency decisions by promoting frank and independent discussion among those responsible for making governmental decisions. *Sears*, 421 U.S. at 151. See *EPA v. Mink*, 410 U.S. at 87 (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958)).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

There are, however, exceptions to this general rule. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987); *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

In addition to providing categories of records exempt from mandatory disclosure, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional material and factual material that is not otherwise exempt from release, the factual material must be segregated and released to the requester.

In its determination letter dated December 5, 2005, Idaho withheld portions of the documents in Items 5 and 6 from the Appellant, claiming that those portions contain information that is predecisional and part of the deliberative process. We have reviewed these documents and believe that the portions Idaho withheld were properly withheld under Exemption 5. The purpose of the Report (Item 6) is stated to "[p]rovide the Team conclusions and recommendations resulting from the February 2-13, 2004, independent assessment of the Advanced Test Reactor." Report dated February 13, 2004, from ATR Planning Assessment Team to Elizabeth D. Sellers, Manager, Idaho. The Memorandum, Item 5 in the Appeal Letter, communicates the core observations of the Report. Memorandum dated March 19, 2004, from Elizabeth D. Sellers to William D. Magwood, IV, Director, Office of Nuclear Energy, Science and Technology. Both documents contain recommendations and opinions relating to the ATR continued operations. The Report contains specific recommendations and opinions regarding the future operation of the ATR

and how management and oversight of the ATR should be structured. The Report provides DOE's Idaho Operations Manager with an independent assessment of the ATR at her request; the results of the assessment reflect the opinions, recommendations, and findings of the Planning Assessment Team, and do not reflect final agency decisions. The Memorandum summarizes recommendations and opinions contained in the Report. Both opinion and facts were withheld from the documents by Idaho. The factual information in question was selected from a larger quantity of factual information in a manner such that release of the selection would tend to reveal the deliberative process of the manager and the Team in formulating their respective documents. This factual information meets the standard for non-disclosure set forth in *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987).

In a determination letter dated January 23, 2006, Idaho withheld portions of Item 7f from the Appellant, stating that those portions contain information that reflects the opinions and recommendations obtained from employees. Furthermore, the survey results and raw data were obtained from employees under a promise of confidentiality. These results are used to make recommendations to management on how to fashion policies. We have reviewed these documents and believe that the portions Idaho withheld were properly withheld under Exemption 5. Release of this information would inhibit Idaho's ability to obtain candidly expressed opinions in the future. Additionally, because these opinions and recommendations were made at an early stage of the process by Idaho employees, not by decision makers themselves, they may not accurately reflect Idaho's opinions or current practices.

The fact that material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. Although the public does have a general interest in learning about the subject matter of Items 5, 6, and 7f, we find that interest to be attenuated by the fact that the withheld material is composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is far outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. Accordingly, we conclude that release of the withheld information would not be in the public interest.

Item 7-Nine documents being processed as of December 16, 2005

As of December 16, 2005, the Appellant identified nine documents that had been identified as responsive to its request that were still being processed or had been transferred to DOE headquarters for a response. First, regarding Items 7a-d, Idaho explained in a

determination letter dated October 27, 2005, that those items were generated at DOE Headquarters in Washington, DC, and had therefore been forwarded for processing to Mr. Abel Lopez, who is Director of FOIA/Privacy Act Group in Washington, DC. Determination Letter dated October 27, 2005, from Nicole Brooks, Idaho, to Appellant. Mr. Lopez released documents responsive to those items on November 21, 2006. Determination Letter dated November 21, 2006, from Abel Lopez, Director, FOIA/Privacy Act Group, DOE Headquarters, to Appellant. As explained in that letter, it was determined that those four items do not reflect four separate reports or documents, but rather reflect four separate findings of a DOE inspection. Those findings were part of a document that had already been provided to the Appellant by Idaho in its determination letter dated August 26, 2005, and that had been listed as item 16 on the index of that determination letter. In addition, DOE's search in Washington, DC, identified three other documents responsive to those four items. Those responsive documents were released in their entirety with the determination letter dated November 21, 2006.

Second, Item 7e, which is the same as Item 6, was released to the Appellant with redactions by letter dated December 5, 2005, and is addressed previously in this Decision. Third, Item 7f was released to the Appellant with redactions by letter dated January 23, 2006, and is also addressed in this Decision above. Fourth, Items 7g and 7h were released to the Appellant in full on January 23, 2006. Determination Letter dated January 23, 2006 from Nicole Brooks, Idaho, to Appellant.

Finally, Idaho explained in its determination letter dated January 23, 2006, that it had conducted a thorough search of its files for information in response to Item 7i, which the Appellant had clarified to be "All Un-reviewed Safety Questions (USQ) reports for 2004 related to Pu²³⁸", but that no such reports exist. Determination Letter dated January 23, 2006, from Nicole Brooks, Idaho, to Appellant. In responding to a request for information filed under the FOIA, it is well established that an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). "The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord *Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., *Glen Bowers*, January 9, 2006 (Case No. TFA-0138); *Doris M. Harthun*, April 8, 2003, (Case No. TFA-0015).

Idaho's original search was based on a computer query of all Unreviewed Safety Question (USQ) ATR, RTC, and Material and Fuels Complex Summary Reports for the year 2000 to present, as originally requested by the Appellant. If an issue is raised and given a USQ tracking number, a USQ screen is completed. If the determination is positive, then a USQ determination is completed and added to the USQ summary report. The USQ summary report does not include all USQ screens because a negative screen is not a safety issue and

no further action is necessary. In this situation, a report would not be created because it would be deemed unnecessary and that USQ screen would not be included on the USQ Summary Report list. For this reason, there are gaps in the ascension numbers on the Summary Report Lists which were noted by EDI in its September 21, 2005 request. We have confirmed with Idaho that the USQ Summary Report lists that were sent to the Appellant in response to their FOIA requests are comprehensive and complete compilations of all USQ reports. Therefore, there are no additional USQ reports that were "not listed in DOE Summary Report lists sent August 25, 2005" as requested in Item 7i of this Appeal.

III. CONCLUSION

A number of the items in the Appellant's Appeal have been dealt with previously. Item 1 was addressed by our decision of March 16, 2006. Items 2, 3, 7a-d, 7g and 7h have been released to the Appellant in full. Item 4 does not refer to a specific document, but appears to be an introduction to subsequent Items in the Appeal. Idaho properly withheld the redacted material from Items 5, 6 (which is identical to Item 7e), and 7f under Exemption 5. Idaho could not find any documents responsive to Item 7i. For the reasons set forth above, the Appeal will be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by Environmental Defense Institute on September 18, 2006, Case No. TFA-0177, is hereby denied.
- (2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 13, 2006

